



THE ATTORNEY GENERAL OF TEXAS

AUSTIN 11, TEXAS

WILL WILSON
ATTORNEY GENERAL

August 25, 1960

Hon. Penn J. Jackson, Chairman
State Board of Insurance
International Life Building
Austin, Texas

Opinion No. WW-920

Re: Whether a Termite Service contract and a guarantee bond is a contract of insurance which would subject companies issuing same to the provisions of the Texas Insurance Code.

Dear Mr. Jackson:

You have requested our opinion on the question of whether a given termite service contract submitted with your request is a contract of insurance. Your concern arises by virtue of the fact that none of the companies issuing such contracts are licensed under the Texas Insurance Code. We answer your question in the negative.

In essence, the contract provides that for a given consideration the issuing company will treat the building or buildings covered by such contract. It further provides that should termites recur during the period covered by the contract the premises will be treated again free of charge and guarantees the purchaser against any termite damage during such period.

It is obvious that the primary inducement to this contract is the extermination of termites through the treatment afforded by the issuing company. It is this service which it is in the business of selling. The guarantee is in the nature of a promise that such treatment is so effective that no termites will reappear during the stated period and hence that no termite damage will occur. The situation is analogous to that confronting the Court in State v. Standard Oil Co., 35 N.E.2d 437, involving a tire warranty. The Court there said:

" . . . Relating to the sale of commodities, a warranty has been defined as a statement or representation having to do with the kind, quality, variety or title of the goods sold. On the other hand, a number of courts have announced the rule that if the vendor of goods guarantees them against hazards disconnected with defects in the articles themselves, such guaranty is equivalent to a contract of insurance.

" . . . We find difficulty in construing this agreement as more than a representation that the tires being sold are so well and carefully manufactured that they will give satisfactory service under ordinary usage for

a specified number of months, excluding happenings disassociated from imperfections in the tires themselves."

We can find no case directly in point and the line between a contract which is primarily insurance and one which is construed as a warranty is shadowy at best. However, as a general rule, the courts examine the contract as a whole, including its motivating factors, to determine its primary characteristic or fundamental purpose. As stated in Transportation Guarantee Co. v. Jellin, 174 Pac.2d 625:

"Absence or presence of assumption of risk or peril is not the sole test to be applied in determining . . . status. The question, more broadly, is whether, looking at the plan of operation as a whole, 'service' rather than 'indemnity' is its principle object and purpose."

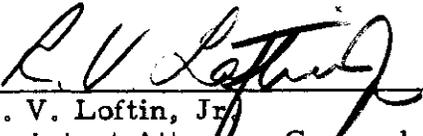
The principle purpose of the Contract in question is the service of eradicating termites, not the indemnity for damages caused in the event they recur.

SUMMARY

The specific termite service contract and guarantee bond submitted with the opinion request is not a contract of insurance.

Respectfully submitted,

WILL WILSON
Attorney General of Texas

By 
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APPROVED:

OPINION COMMITTEE:

W. V. Geppert, Chairman
J. C. Davis
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Robert H. Walls

REVIEWED FOR THE ATTORNEY GENERAL
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